

### **RULE 16.3**

#### **ALTERNATIVE DISPUTE RESOLUTION**

**(a) Authorization for and Purpose of Mediation.** Pursuant to 28 U.S.C. § 652, litigants in civil cases may be required to consider the use of an alternative dispute resolution (“ADR”) process. The court’s primary ADR procedure is mediation facilitated by a private mediator chosen by the parties. The mediation process is intended to improve communication among the parties and provide the opportunity for greater litigant involvement in the earlier resolution of disputes, with the ultimate goal of securing the just, speedy and inexpensive disposition of civil cases.

**(b) Summary Description of ADR Procedures.**

(1) Mediation. Mediation utilizes a neutral third party to facilitate discussions among the parties to assist them in finding a mutually acceptable resolution of the case. The goal of the mediator, who may meet with the parties jointly and separately, is to help them identify their underlying interests, improve communication, and generate settlement options. A mediator may employ traditional facilitative strategies (aimed at solutions to problems underlying the litigation), evaluative strategies (designed to present the strengths and weaknesses of the case, or its relative value), or a combination of both approaches. In limited circumstances and at the judge’s discretion, the judge may conduct the mediation.

(2) Other ADR Procedures. In appropriate cases, the court will facilitate other forms of ADR, as authorized by 28 U.S.C. §§ 654-658, including, but not limited to, early neutral evaluation, minitrial, and arbitration.

**(c) Referral of Cases to Mediation.** Consistent with Fed. R. Civ. P. 16, the judge to whom a case has been assigned or referred for case management will discuss ADR procedures at the scheduling conference. In most cases the judge will likely enter an order directing counsel and the parties, at the earliest appropriate opportunity, to mediate their dispute with a private mediator.

(1) Referral and Selection Process. Referral of a case to mediation may be ordered at any appropriate time. If mediation is ordered, the parties will jointly select the mediator. The parties may select any person to serve as mediator, and the person need not be included on the list of mediators maintained by the court. Absent substantial countervailing considerations, the assigned judge will appoint the mediator whom the parties have jointly selected. If the parties cannot agree on the selection of a mediator, the parties will submit their nominations to the judge who will select the mediator.

(2) Attendance at Mediation Session by Persons with Settlement Authority. Attendance by a party or its representative with settlement authority at the mediation is mandatory, unless the court orders otherwise. The purpose of this requirement is to have the

party or representative who can settle the case during the course of the mediation present at the mediation. A unit or agency of government satisfies this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements. The parties' counsel responsible for resolution of the case shall also be present.

(3) Notice to Interested Nonparties. Counsel shall coordinate with the mediator and identify any nonparties who have an interest in the case (including, but not limited to, primary and excess liability insurance carriers, subrogees, and lienholders). Counsel shall provide written notice to all interested nonparties informing them of the date and location of the mediation and that their participation is strongly encouraged. A copy of such notice shall be provided to all parties and the mediator.

(4) Requests to be Excused. Unless all parties agree, only the judge may excuse the presence of a person with settlement authority from attending the mediation in person.

(5) Sanctions. In appropriate circumstances, the court may impose sanctions pursuant to Fed.R.Civ.P. 16(f).

**(d) List of Mediators.** The ADR administrator will maintain a List of Mediators who have expressed a desire to mediate cases pending in this court who have complied with the requirements of this paragraph.

(1) Minimum Qualifications and Training. For placement on the list of mediators, the person must be a lawyer and:

(i) must have been a member of a state or federal bar in good standing for the preceding five years and satisfy one of the following additional requirements: (a)

participation in 40 hours of approved mediation training within the past two years; (b) approved as a mediator for civil cases pursuant to the rules adopted by the Kansas Supreme Court; or (c) participated as mediator, co-mediator or counsel in ten mediations in court cases in the past three years;

(ii) must abide by the disclosure rule set forth in paragraph (g) below;

(iii) must agree to participate periodically in courtapproved ADR orientation or refresher training;

(iv) must agree (a) to permit participants in the mediation sessions they conduct to give feedback to the court about how the process was conducted and (b) to submit reports upon conclusion of the mediation; and

(v) must agree to serve as a mediator on a pro bono basis

or, in the court's discretion, at a reduced fee in two cases per year.

(2) Placement on the List of Mediators. All applicants must complete the required application form. The applications will be reviewed by the ADR administrator and applicants meeting the minimum requirements will be placed on a list of mediators. Being on the list of mediators is not an indication that a person is an effective mediator and no certification results by placement on the list. The list serves as a resource of persons who offer mediation services and appear to meet the court's minimum requirements.

(3) Evaluation. The ADR administrator is authorized to develop an evaluation program for the purpose of evaluating the mediation services of private mediators. Any comments or complaints concerning mediators on the list should be made to the ADR administrator.

(4) Removal from the List of Mediators. The ADR administrator may remove any person from the list of mediators for any reason consistent with the effective management of the program.

**(e) Compensation of Private Mediators.** Except when serving pro bono, private mediators shall be compensated at the rate negotiated by counsel and the mediator. The fee shall be divided by agreement of the parties or as ordered by the court.

**(f) Mediation with Indigent Parties.** If a party is indigent, the mediation services shall be provided pro bono or at a reduced rate to that party. The judge will determine whether a party is indigent.

**(g) Required Disclosures by Mediator.** The mediator shall immediately disclose to the parties the relevant facts giving rise to any potential conflict of interest, including the following:

(1) any basis upon which the mediator's impartiality might reasonably be questioned;

(2) any bias or prejudice concerning a party to this case;

(3) personal knowledge of evidentiary facts that are disputed in this case;

(4) the mediator is serving as a lawyer in the case;

(5) the mediator's spouse is serving as a lawyer in the case;

(6) any lawyer in the mediator's firm has served or is serving as a lawyer in the case;

(7) the mediator or the mediator's spouse is a party to the case or an officer, director, or trustee of a party to the case;

(8) the mediator or the mediator's spouse has been or is likely to be a material witness in the case;

(9) a lawyer with whom the mediator currently practices has been or is likely to be a material witness in the case;

(10) the mediator (directly or as a fiduciary), the mediator's spouse, or any of the mediator's minor children who live with the

mediator have a financial interest in the case or in any party to the case;

**(h) Withdrawal.** If a party requests the mediator to withdraw because of the disclosures made pursuant to paragraph (g) above, the mediator shall withdraw, and the parties shall agree upon another mediator.

**(i) Confidentiality.** Except as provided in paragraph (j) below, this court, the mediator, all counsel, the parties, and any other persons involved in the mediation shall treat as “confidential information” the contents of written mediation statements, anything that happened or was said, any position taken, and any view of the merits of the case formed by any participant in connection with any mediation. “Confidential information” shall not be:

- (1) disclosed to anyone not involved in the mediation process;
- (2) disclosed to the trial judge; or
- (3) discoverable or subject to compulsory process or used for any purpose, except as provided in paragraph (j) below, in any pending or future proceeding in any court unless a court determines that such testimony or disclosure is necessary to:
  - (i) prevent a manifest injustice,
  - (ii) help establish a violation of law or ethical violation, or
  - (iii) prevent harm to the public health or safety, of such magnitude in the particular case to outweigh the integrity of dispute resolution proceedings in general by reducing the confidence of parties in future cases that their communications will remain confidential.

**(j) Limited Exceptions to Confidentiality.** Paragraph (i) above does not prohibit:

- (1) disclosures as may be stipulated by all parties and the mediator;
- (2) disclosure of an agreement by all parties to the agreement which appears to constitute a settlement contract if necessary in proceedings to determine the existence of a binding settlement contract;
- (3) a report to or an inquiry by the ADR administrator regarding a possible violation of these local rules;
- (4) a report of a possible violation of a court order to the judge signing the order;
- (5) any participant or the mediator from responding to an appropriate request for information duly made by persons authorized by the court to monitor or evaluate the court’s ADR program; or
- (6) disclosures as are otherwise required by law.

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As amended 03/05 (formerly D.Kan.S.O. 04-1 and 03-6), 4/8/99,  
2/28/97, 2/3/95.

Renumbered 6/95. Formerly Rule 214.

Further renumbered 2/97.